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Recent Decisions: Criminal Law--Right to Jury Trial in Contempt Proceedings--Applied to the States [*Bloom v. Illinois*, 391 U.S. (1968)]

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CRIMINAL LAW — RIGHT TO JURY TRIAL IN CONTEMPT PROCEEDINGS — APPLIED TO THE STATES

Bloom v. Illinois, 391 U.S. 194 (1968).

In the recent case of *Bloom v. Illinois*[1] the United States Supreme Court again used the due process clause of the 14th amendment to extend the sphere of influence of the Bill of Rights. Following its pronouncement in *Duncan v. Louisiana*[2] that the sixth amendment guarantee of trial by jury[3] applies to state prosecutions for "serious" criminal offenses, the *Bloom* decision holds that the same right to trial by jury applies in state prosecutions for criminal contempt of court. However, left unresolved are two important questions: the precise definition of *serious* crime and the extent to which the sixth amendment's penumbral rights have been carried over to the states.[4]

In *Bloom* the petitioner attempted to introduce a false will into probate after the death of the supposed testator. Finding that the petitioner had tampered with this will, the Illinois trial court sustained the prosecutor's charge of criminal contempt,[5] while refusing the accused's demand for a jury trial. Bloom was sentenced to 2 years in prison,[6] and, the Illinois Supreme Court affirmed the conviction.[7] The United States Supreme Court reversed, holding that due process of law[8] requires that criminal contemners sentenced to

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[1] 391 U.S. 194 (1968).

[2] 391 U.S. 145 (1968), decided the same day as *Bloom*.

[3] The sixth amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ." U.S. CONST. amend. VI. However, the specific guarantees of the Bill of Rights are not directly applicable to the states. Only provisions of the Bill of Rights "fundamental and essential to a fair trial" are made obligatory on the states by operation of the 14th amendment. Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

[4] "Penumbral rights" are not enumerated in the Bill of Rights, but are read into the express guarantees to give them "life, meaning, and substance." *See* Griswold v. Connecticut, 381 U.S. 479, 483-84 (1965). For example, the penumbral rights of the sixth amendment guarantee of trial by jury might include the right to an unanimous verdict and to a 12-man jury. *See* note 26 *infra*.

[5] Criminal contempt can be differentiated from civil contempt by considering the purposes of punishment for the particular act. Imprisonment for civil contempt is remedial; one is imprisoned until he completes a mandatory act that benefits the complainant. Criminal contempt is punished by a fixed term of imprisonment in order to vindicate the court's authority; the punishment is punitive. Gompers v. Buck Stove & Range Co., 221 U.S. 418, 441-42 (1911). *See also* 17 C.J.S. *Contempt* § 15 (1963).

[6] In Illinois no maximum punishment is provided for convictions of criminal contempt. People v. Stollar, 31 Ill. 2d 154, 158-59, 201 N.E.2d 97, 99 (1964).

[7] 35 Ill. 2d 255, 220 N.E.2d 475 (1966).

[8] *See* note 2 *supra*.

2 years imprisonment must be accorded a jury trial in state courts. The Court reasoned that criminal contempt is a serious offense if punished by 2 years in prison, and that due process of law requires a jury trial before an accused may be punished for a *serious* offense. Recognizing that procedural fairness in contempt cases has a competing consideration — criminal contempts are to be tried summarily to vindicate the court's authority — the Court, nonetheless, concluded that in light of the seriousness of the offense, the fundamental protection of a jury trial was paramount.[9]

By applying the guaranteed procedural protection of a jury trial in *Bloom*, the Court has overturned the doctrine of summary trials in criminal contempt proceedings, a doctrine which emanated from the time of Blackstone's *Commentaries*.[10] Gradually, three preceding cases laid the foundation upon which the *Bloom* decision built a new rule. *United States v. Barnett*[11] and *Cheff v. Schnackenberg*[12] were criminal contempt cases in which defendants were sentenced to 6 months imprisonment without being afforded a jury trial. Al-

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[9] 391 U.S. at 208-10. The purpose of summary trials in criminal contempt cases is to preserve order in the court and to have an available sanction to insure that court orders are followed. *Ex parte* Terry, 128 U.S. 289, 303, 309 (1888). *See also* Cooke v. United States, 267 U.S. 517, 539 (1925); *In re* Debs, 158 U.S. 564, 594-96 (1895); Eilenbecker v. District Court, 134 U.S. 31, 36-38 (1890). Opposed to the purposes of summary trial of criminal contemners is the protection provided by a jury trial against arbitrary exercise of a judge's power. Since contempt will either be a direct insult to the court or represent a rejection of the judicial institution, a judge's temperament may be short in dealing with criminal contemners. The jury will protect the accused from bearing the wrath of a judge's uncontrolled anger. 391 U.S. at 202.

[10] Before Blackstone's treatise was written, contempts which occurred in the actual presence of the court were tried with a jury. However, a strange series of events took place in England in 1765 which caused a great change in the law. An Englishman was convicted of contempt of court, and a technical error voided the case. King v. Almon, 97 Eng. Rep. 97, 99-101 (K.B. 1765). Justice Wilmot's opinion was never delivered. In 1802 after Wilmot's death, his son published his judicial notes which included the undelivered opinion. Wilmot declared that the courts always had the power to punish contempts summarily, even if they were not committed in the presence of the court. However, subsequent research has indicated that Wilmot's declaration was without legal support. Despite the precedent which differed with Wilmot's view, Blackstone accepted the opinion of his friend, Wilmot. In Blackstone's *Commentaries* it is declared that criminal contempts are triable summarily. 4 BLACKSTONE, COMMENTARIES 286-87 (Dawson ed. 1966). Blackstone's treatise became highly respected and is the basis of much of our law today. Goldfarb & Kurzman, *Civil Rights v. Civil Liberties: The Jury Trial Issue*, 12 U.C.L.A. L. REV. 486, 488-89 (1965).

Notwithstanding the persuasive historical evidence pointing to Blackstone's error, the *Bloom* Court was reluctant to rest its decision on historical analysis: "We do not find the history of criminal contempt sufficiently simple or unambiguous to rest rejection of our prior decisions entirely on historical grounds . . . ." 391 U.S. at 200 n.2.

[11] 376 U.S. 681 (1964).

[12] 384 U.S. 373 (1966).

though the Supreme Court affirmed both convictions, these cases indicate that the defendants would have been entitled to a jury trial if the punishments had been greater than 6 months. Given impetus by a footnote in the *Barnett* case, which intimated that the right to jury trial would be available to criminal contemners if they were to be punished by more than 6 months imprisonment,[13] the *Cheff* opinion, invoking the Court's supervisory power over the federal courts,[14] issued a directive stating that: "Sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof."[15] The final ingredient was supplied in *Duncan v. Louisiana*,[16] decided the same day as *Bloom*. Although not concerned with criminal contempts, *Duncan* held that an individual accused of a criminal offense who faced a maximum of 2 years imprisonment[17] was entitled to a jury trial in the state court. Since Mr. Bloom was faced with 2 years imprisonment (an imprisonment that entitled the criminal contemner to a jury trial in federal courts and an imprisonment that makes the crime a serious offense allowing the accused a jury trial in state courts) the Supreme Court reversed the Illinois decision, stating that the accused had been deprived of his freedom without due process.[18]

Constant throughout *Barnett*, *Cheff*, and *Duncan* is the premise that the length of punishment determines whether the right to jury trial attaches.[19] The *Bloom* decision makes it clear that the sixth

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[13] In view of the impending contempt hearing, effective administration of justice requires that this dictum be added. Some members of the court are of the view that without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses. 376 U.S. at 694-95 n.12.

A "petty offense" is defined as any crime not punishable by more than 6 months in prison. 18 U.S.C. § 1(3) (1958).

[14] *See generally* McNabb v. United States 318 U.S. 332 (1943). The Supreme Court's supervisory power over federal courts is inferred from Article III, section 1, of the Federal Constitution. This power of supervision does not extend to state courts.

[15] 384 U.S. at 380.

[16] 391 U.S. 145 (1968).

[17] Duncan was not actually imprisoned for two years, but he faced a maximum imprisonment of 2 years according to statute. LA. CONST. art. VII, § 41. Bloom actually faced 2 years in prison and the Court said that in order to determine the seriousness of the offense where the legislature has not expressed a judgement as to the seriousness of the offense "we look to the penalty actually imposed." 391 U.S. at 211. In *Duncan* the court considered the maximum imprisonment possible in determining the seriousness of the offense.

[18] *See* note 2 *supra*.

[19] At this point it should be noted that several federal statutory guarantees of jury trial for criminal contempts are available in certain situations, none of which was applicable to *Bloom*: 18 U.S.C. §§ 402, 3691 (1964) (jury trial in criminal contempt proceedings where the act in question constitutes a separate criminal offense); 18

amendment right to jury trial attaches when a criminal contemner receives a serious sentence. Left unresolved, however, is the question of what constitutes a serious offense. Defining this terminology would have enhanced the value of the decision, since an ideal opinion not only settles the issues which counsel brings before a court in light of social policy considerations, but also must "provide a guide to positive action in the future."[20] Having left unresolved the precise definition of serious crime, it is evident that the Court has not reached the pinnacle of judicial craftsmanship in the *Bloom* opinion.

Impliedly, the Court's reliance on *Cheff* sets the critical line at 6 months, a result which is in accord with the federal definition of petty offense — any crime punishable by imprisonment for 6 months or less.[21] However, the majority clearly points out that the Court is not deciding the question of what is a serious crime.[22] Since the right to jury trial attaches only when the crime is serious, the Court's failure to promulgate a precise definition will make it exceedingly difficult for state courts to decide whether they must afford jury trials in cases where the maximum jail sentence is less than 2 years.

The Court has also left unresolved the question of whether the federal jury standards of a 12-man jury and a unanimous verdict are guaranteed in a state court to one accused of a serious crime.[23] In

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U.S.C. §§ 3691, 3692 (1964) (jury trial in criminal contempts arising out of labor disputes); Civil Rights Act of 1957, § 151, 42 U.S.C. § 1995 (1964) (mandatory jury trial de novo where sentence exceeds 45 days for criminal contempt arising under the Act); Civil Rights Act of 1964, § 1101, 42 U.S.C. § 2000 h (1964) (in any criminal contempt proceeding under the Act, the contempt must have been shown to be intentional and the maximum sentence may not exceed 6 months).

[20] Lewis, *The High Court: Final . . . But Fallible*, 19 CASE W. RES. L. REV. 526, 554 (1968).

[21] 18 U.S.C. § 1(3) (1964).

[22] "In *Duncan* we have said that we need not settle 'the exact location of the line between petty offense and serious crimes' but that 'a crime punishable by two years in prison is . . . a serious crime and not a petty offense.'" 391 U.S. at 211. The fact that the Court has not set the precise point at which the right to jury trial will attach was reiterated in DeStefano v. Woods, 392 U.S. 631 (1968). "Both *Duncan* and *Bloom* left open the question whether a contempt punished by imprisonment one year is, by virtue of that sentence, a sufficiently serious matter to require that a request for jury trial be honored." *Id.* at 633.

[23] Another problem which the *Bloom* decision failed to resolve concerns the question of retroactive application. The Court answered this question a few weeks later in DeStefano v. Woods, *id.*, holding, per curiam, that both *Bloom* and *Duncan* are to be applied prospectively from the date of decision: "[W]e will not reverse state convictions for failure to grant jury trial where trials began prior to May 20, 1968, the date of this Court's decisions in *Duncan v. Louisana* and *Bloom v. Illinois*." *Id.* at 635. In reaching this decision, the Court applied the test for prospective overruling enunciated in Stovall v. Denno, 388 U.S. 293, 297 (1967), whereby a decision reversing prior doctrines in the area of criminal law will be applied prospectively from date of decision

his concurring opinion, Mr. Justice Fortas pointed to this hiatus in the majority opinion;[24] he reasoned that the majority's reliance on *Duncan v. Louisiana*[25] incorporated sub silentio into the *Bloom* decision a footnote in *Duncan* which declares that the ancillary or penumbral rights of the sixth amendment (the right to a 12-man jury and a unanimous verdict) are guaranteed in state courts, as well as federal courts.[26] In deference to principles of federalism, Justice Fortas was unwilling to accept such a drastic curtailment of the states' power to set jury standards. Although there is logic to the Fortas argument, the reasoning is strained, and it seems highly unlikely that the Court would effect such a major limitation on state power by implication.[27]

Since the majority failed to rule definitively on the question of whether federal jury standards are to be applied to the states, the states are bound only to a watered-down version of the sixth amendment guarantee of trial by jury. Furthermore, since 12 states do not presently require 12-man juries in all serious criminal cases,[28] the

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when law enforcement authorities have justifiably relied on the old standards and where retroactive application would seriously disrupt the administration of justice in the state courts. For a discussion of the *Stovall* case and the problem of prospective overruling in general, see Recent Decision, 19 CASE W. RES. L. REV. 410 (1968).

[24] 194 U.S. at 211-14.

[25] *See* note 16 *supra.*

[26] 194 U.S. at 158-59 n.30. In Thompson v. Utah, 170 U.S. 348 (1898), the Court interpreted the sixth amendment as guaranteeing a 12-man jury in serious criminal cases, and in Maxwell v. Dow, 176 U.S. 581 (1900), it was held that the sixth amendment required a unanimous verdict. Left unresolved in *Bloom* is the question of whether the due process standard of the sixth amendment makes these ancillary rights obligatory on state trials.

[27] In DeStefano v. Woods, 392 U.S. 631 (1968), the Court noted that Duncan v. Louisana, 391 U.S. 145 (1968), had *not* decided whether the federal requirement of a unanimous verdict was constitutionally obligatory for state trials: "*Duncan* left open the question of the continued vitality of the statement in *Maxwell v. Dow*, 176 U.S. 581, 586, that the Sixth Amendment right to jury trial includes a right not to be convicted except by a unanimous verdict." *Id.* at 633. *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 935 (1965), where it is suggested that since the penumbral rights are declared through the Court's supervisory power, they are controlling only in federal courts. *See also* Recent Decision, 19 CASE W. RES. L. REV. 410, 419 n.53 (1968). However, if the penumbral rights are to give "life, meaning, and substance" to the core right, the line should not be drawn between federal and state courts. The penumbral right should be extended to anyone in any court. *See, e.g.*, Chapman v. California, 386 U.S. 18 (1967); Parker v. Gladden, 385 U.S. 363 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

[28] Of the 12 states which do not provide 12-man juries in all serious crimes, five states allow for a jury of less than 12 men in cases where the maximum penalty is one year or less: ALASKA CONST. art. 1, § 11, ALASKA STAT. §§ 22.15.150, 22.15.060, 11.75.030 (1962); IOWA CONST. art. 1, §§ 9-10, IOWA CODE §§ 602.39, 602.15, 687.7 (1966); KY. CONST. §§ 7, 11, 248, KY. REV. STAT. §§ 25.010, 26.010 (Supp.

Court's failure to apply the federal standards to the states will permit the judges in these states to continue to use state rules.

The decision in *Bloom* holds that the right to trial by jury attaches in state courts when criminal contempt rises to the level of a serious offense. Whether a charge of criminal contempt is serious depends upon the length of the sentence, and, as previously noted, neither the *Bloom* nor the *Duncan* decision expressly defines the point at which a jail sentence becomes serious. By implication, the Court's reliance in both *Duncan* and *Bloom* on *Cheff v. Schnackenberg*[29] sets the critical line at 6 months. Since a judge must grant or deny a demand for jury trial before he has knowledge of the circumstances that ordinarily determine the appropriate sentence, he might deny the demand for a jury trial and inflict 6-month imprisonments summarily as a matter of course. However, in the *Duncan* case the Court looked to the maximum sentence *possible* to determine whether the crime charged was serious, and at the time the demand for jury trial is made in a contempt case, the judge possesses the power to sentence the accused to more than 6 months, unless his power to impose sentences for contempt is circumscribed by statute.[30] Assuming that the critical line is 6 months and that the *Duncan* ap-

1966); OKLA. CONST. art. 2, §§ 19,20, OKLA. STAT. tit. 20, § 272, tit. 21, § 10 (1951); VA. CONST. art. 1, §§ 8, 11, VA. CODE §§ 19.1-206, 18.1-9 (1960).

In one of the 12 states, Texas, a six-man jury is authorized in cases in which the punishment is less than two years, but in misdemeanors nine men can render a verdict. TEX. CONST. art. 1, §§ 10, 15, art.5, § 17, TEX. CODE CRIM. P. ANN. art. 4.07, 37.02(1966), TEX. PEN. CODE ANN. art. 1148 (1968). Of the remaining five states, Florida and Utah require a 12-man jury in capital cases only: FLA. CONST. Declaration of Rights §§ 3, 11, art. 5, § 22, FLA. STAT. §§ 913.10, 919.10 (1965); UTAH CONST. art. 1, §§ 10, 12, UTAH CODE ANN. § 78-46-5 (1953). In Oregon, except for a first degree murder case, 10 members can bring forth a verdict. ORE. CONST. art. 1, § 11, ORE. REV. STAT. § 136.610 (1957). In South Carolina, six-man juries are provided for except in the most serious crimes. S.C. CONST. art. 1, §§ 18, 25, art. 5, § 22, S.C. CODE §§ 15-612, 15-618 (1964). In New York State, outside of New York City, if the possible sentence is less than 1 year, a six-man jury is provided, but in New York City the maximum sentence must be greater than a year just to receive a jury trial. N.Y. CONST. art. 1, § 2, art. 6, § 18, PENAL LAW § 1937 (1944), N.Y. CODE CRIM. P. §§ 702, 710 (1958), N.Y.C. CRIM. CT. ACT § 40 (1966), N.Y.C. CRIM. CT. ACT. § 31 (1963). Louisiana, the 12th state, a civil law jurisdiction, provides for a jury trial if the accused may be or must be sentenced to hard labor. In the former situation, the accused is entitled to a five-man jury; in the latter situation, the accused is entitled to a 12-man jury, only 9 of whom must concur in a verdict. LA. CONST. art. 7, § 41; LA. CODE OF CRIM. PROC. art. 782. The preceding statutory breakdown is collected in Brief for Appellant, at Appendix B, Duncan v. Louisiana, 391 U.S. 145 (1968).

In the 12 states which do not presently provide for 12-man juries and unanimous verdicts, defense counsel should be advised to motion that these federal rights be applied in order to preserve appellate review on the matter.

[29] 384 U.S. 373 (1966).

[30] *See* note 32 *infra.*

proach to defining a serious offense is applicable to contempt cases, it follows that defendants accused of criminal contempt in state courts are constitutionally entitled to a jury trial unless the judge's power to impose a jail sentence is limited by statute to a maximum of 6 months. Thus, the *Bloom* decision will have a major impact upon the administration of criminal justice in the 17 states which either have no limit on the sentence which a judge can impose for criminal contempt or a limit in excess of 6 months.[31]
summarily as a matter of course. However, in the *Duncan* case the

Furthermore, the decision in *Bloom* will have the effect of limiting the potential for the arbitrary exercise of judicial power inherent in criminal contempt cases in states which have not limited the judge's contempt powers by statute.[32] Viewed together, the *Bloom* and *Duncan* decisions effect a considerable expansion of the right to trial by jury in state courts whereby defendants charged with misdemeanors punishable by 1 year in jail may now be constitutionally entitled to jury trials. Indeed, the impact of *Bloom* and *Duncan* has already been felt in New York where, as a result of the recent student riots at Columbia University, 900 students are charged with various criminal offenses punishable by up to 1 year in prison.

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[31] Twelve states have no limit on the punishment that the judge may impose for criminal contempt: FLA. STAT. ANN. § 36.22 (1961); ME. REV. STAT. ANN. tit. 14, § 252 (1964); MD. ANN. CODE art. 26 § 4 (1957); MO. ANN. STAT. § 476.120 (1949); NEB. REV. STAT. § 25-2122-2123 (1964); N.M. STAT. ANN. §§ 16-1-2 (1953), 36-16-2 (Supp. 1964); R.I. GEN. LAWS ANN. § 8-6-1 (1956); S.C. CODE ANN. §§ 10-1738, 15-231 (1962); VT. STAT. ANN. tit. 12, §123 (1959); VA. CODE ANN. §§ 18.1-292-293 (1950); W. VA. CODE ANN. § 61-5-26 (1966); WYO. STAT. ANN. §1-669 (1957). Five states have limits in excess of 6 months which can be imposed on a criminal contemner: GA. CODE ANN. § 24-105 (1959); DEL. SUPER. CT. (CRIM.) R. 42 (1953); KANSAS GEN. STAT. ANN. §§ 20-1204, 21-11 (1964); N.J. STAT. ANN. § 2A:857 (1952); S.D. CODE §§ 13.1235, 13.0607 (1939), 33.3703 (Supp. 1960), *cited in* 1967 DUKE L.J. 654 n.64 (1967). If the critical line for serious offense is 6 months, and if the *Duncan* approach to defining serious offense in terms of the maximum sentence possible is applicable to contempt cases, the constitutionality of these statutes has been brought into serious question by the *Bloom* decision.

[32] The necessary corollary of this limitation on the judge's power is an expansion of the jury's power to control the court's ability to vindicate its authority and implement substantive law. By way of illustration, assume that a restaurant owner has been charged with contempt for refusing to obey a court order enjoining him from racial discrimination and for misconduct during the injunction proceedings. Assume also that this occurs in a state that has not limited the judge's contempt powers by statute, the potential sentence is greater than 6 months, and the defendant is entitled to trial by jury on the charge of criminal contempt. Under such circumstances, a jury sympathetic with the restaurant owner's racial views could find the defendant not guilty and thereby frustrate the court's ability to preserve its dignity and enforce the law. In view of this possibility, states which presently have no limits on a judge's contempt powers should be advised to impose a 6-month limitation on the judge's power to sentence for contempt in order to preserve the court's power to maintain courtroom decorum and enforce its decrees.